No. 91-2051

In The

Supreme Court of the United States

October Term, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

MARK BARNETT*
Attorney General
State of South Dakota

JOHN P. GUHIN
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-3215
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

DOES THE CHEYENNE RIVER SIOUX TRIBE HAVE AUTHORITY TO REGULATE NON-INDIANS HUNTING AND FISHING ON LANDS AND OVERLYING WATERS ACQUIRED IN FEE BY THE UNITED STATES FOR CONSTRUCTION AND OPERATION OF THE OAHE RESERVOIR WITHIN THE TRIBE'S RESERVATION UNDER THE FLOOD CONTROL ACT OF 1944 AND THE 1954 CHEYENNE RIVER ACT?

LIST OF PARTIES

Parties to this case are: the State of South Dakota in its own behalf and as parens patriae, Plaintiff-Petitioner; Gregg Bourland, personally and as chairman of the Cheyenne River Sioux Tribe, Defendant-Respondent; and Dennis Rousseau, personally and as director of the Cheyenne River Sioux Tribe Game, Fish and Parks, Defendant-Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

DECISIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit of November 21, 1991, in Case Nos. 90-5486, 90-5515 is reported at 949 F.2d 984 (8th Cir. 1991). The opinion appears in the Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. App. A-1 – A-51).

The Memorandum Opinion dated August 21, 1990, and Judgment dated August 22, 1990, of the United States District Court for the District of South Dakota, in Civil Action No. 88-3049 are unreported and appear in the Joint Appendix (J.A. 50-151).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on November 21, 1991 (Pet. App. A-52 – A-54). The Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 23, 1992 (Pet. App. A-55). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The statutory provisions involved in this case are as follows: Section 4 of the Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887 (1944). The provision is lengthy and is therefore not set forth here. It appears as an Appendix to the Petition for Writ of Certiorari (Pet. App. A-185). The second statute at issue is Public Law No. 870, 64 Stat. 1093 (1950). The statute appears as an Appendix to the Petition for Writ of Certiorari (Pet. App. A-187). The third statute at issue is the Cheyenne River Act of 1954, Pub. L. No. 776, 68 Stat. 1191 (1954). This act appears in the Joint Appendix (J.A. 234).[1]

---

[1] The Petitioner has used the notation "T" to refer to the Trial Transcript and the notation "PHT" to refer to the Preliminary Hearing Transcript. The notation "Ex." refers to Trial Exhibits and the notation "PH Ex." refers to Preliminary Hearing Exhibits. In addition, the notation "PTA" followed by a letter or double letters refers to the Petitioner's four-volume Appendix to its Trial Brief below. *See* R 133. The notation "PRB B" refers to Appendix B to the Reply Brief of State of South Dakota to Defendants' Pretrial Memorandum. *See* R 157.

STATEMENT OF THE CASE

In 1944, Congress enacted the Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887, and thus authorized the construction of several large reservoirs on the Missouri River in North and South Dakota. This case concerns whether the Cheyenne River Sioux Tribe possesses civil regulatory jurisdiction over non-Indians on lands and overlying waters acquired in fee by the United States for construction of the Oahe Reservoir in South Dakota, a principal component of the Missouri River reservoir system.

Approximately 104,000 acres of the lands at issue were acquired from Indians and the Tribe itself. In addition, eighteen thousand acres of land were acquired from non-Indians. The area acquired from Indians, the Tribe and non-Indians taken together constitutes the "taken area" and is commonly known by that name. The "taken area" constitutes not only part of the Oahe project but, in addition, constitutes the eastern land and water boundary of the Cheyenne River Sioux Reservation.

A. The Flood Control Act of 1944.

The Flood Control Act of 1944, Pub. L. No. 534, 58 Stat. 887 (1944) authorized the construction of several large reservoirs on the Missouri River for the primary purposes of controlling flooding, providing for upstream irrigation needs, and addressing downstream navigation needs. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 499-504 (1988). A further purpose of the reservoirs was to serve fish, wildlife and recreation needs as indicated by Section 4 of the Act which requires that the reservoirs built under the authority of the Act "shall be open to public use generally, without charge." The Act also specifies in Section 4 that

> No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

(Pet. App. A-186).

B. Land Acquired from the Tribe and its Members.

Approximately 104,000 acres of land and overlying waters were acquired in fee by the United States from the Cheyenne River Tribe, or its members, for "construction, protection, development, and use" of the Oahe Reservoir on the Missouri River under the Cheyenne River Act of 1954, Pub. L. No. 776, 68 Stat. 1191 (1954) (J.A. 234), and the Flood Control Act of 1944. Most of this land was held in trust for the Tribe or its members at the time of acquisition, but approximately 3,000 acres were held in fee by tribal members. *Hearing of the Committee on Interior and Insular Affairs, Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate; Subcommittee of the Committee on Interior and Insular Affairs of the House of Representatives on S.695, 159 (May 20, 1954)* (hereinafter May 20, 1954, Hearing). (J.A. 202). Furthermore, under Section II of the 1954 Cheyenne River Act, the United States acquired "the bed of the Missouri River so far as it is the eastern boundary of such Cheyenne River Reservation." (J.A. 236).

Legislation to allow negotiation of contracts between the Corps of Engineers and the Tribe for lands needed for construction of the Oahe Reservoir had been introduced in 1949. *See* H.R. 5372, 81st Cong., 1st Sess. (1949) (PTA J). This bill would have provided for "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed. . . . " *Id.* at 4. *See also* S. 1488, 81st Cong., 1st Sess. (1949) (J.A. 182-184) (PTA K). However, the language calling for preservation of treaty rights was *omitted* in the final version of Pub. L. No. 870, 64 Stat. 1093, 1094 (1950) (Pet. App. A-187, A-188), which provided that contracts made under the Act would convey to the United States,

> the title to all tribal, allotted, assigned, and inherited lands or interests therein belonging to the Indians of each tribe required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as the Oahe Dam, including such lands along the margin of said reservoir as may be

> required by the Chief of Engineers, United States Army, for the protection, development, and *use* of said reservoir.

(Emphasis supplied.)

The negotiating effort, however, was unsuccessful, and the entire matter was resubmitted to Congress with negotiations continuing between the parties. The Tribe made several proposals but ultimately demanded $12,632,354, carefully categorizing its demands under several headings including "[l]and . . . ," "[g]razing permit revenue loss" and "*[l]oss of wildlife*, wild fruit, etc." H.R. Rep. No. 2484, 83d Cong., 2d Sess., 5 (1954) (emphasis added) (J.A. 216) (PTA T, 5). Congress responded to these claims and, after revision of the amounts, offered a combined payment of $5,384,000.14 for the land, for tangible future damages such as the loss of wildlife resources and grazing, and for "the bed of the Missouri River so far as it is the eastern boundary of the Cheyenne River Reservation." Pub. L. No. 776, 68 Stat. 1191 (J.A. 236). It also offered an additional $5,160,000 for "complete rehabilitation" of all resident members of the tribe (J.A. 238-239).

The 1954 Cheyenne River Act also provided limited rights for the Tribe. Certain of these rights were of short duration. Under Section VII, the tribal members were given the right "without charge to cut and remove all timber and to salvage . . . improvements." (J.A. 241). Section IX granted the right to members to "use the lands hereby conveyed" until closure (J.A. 242). These rights expired, however, after notice given by the Chief of Engineers of the impending impoundment of the reservoir. Section IX (J.A. 243). Two sections of the Act recognize permanent rights or privileges. Section VI reserves "mineral rights" to the Tribe or individual owner "as their interest may appear under Section I hereof." (J.A. 240). In other words, to the extent that an Indian or the Tribe had an ownership in the land prior to the taking, mineral rights would be reserved for him or it. These rights were "subject to all reasonable regulations which may be imposed by the Chief of Engineers . . . for protection and *use* by the United States of the taking area for the purposes of the Oahe Dam and Reservoir." *Id.* (Emphasis added.)

Section X provided that the Tribe and its members would have the right to graze stock on the taken area. It also provided

> The said Tribal Council and members of said Indian Tribe shall have, without cost, the right of free *access* to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*

(J.A. 244) (emphasis added). Public Law 776 was effective only upon confirmation and acceptance in writing by "three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota." (J.A. 234). One thousand nine hundred forty-two ballots were ultimately cast of which 1,790 or ninety-two percent were cast "for approval of Public Law 776." (J.A. 266) (PRB B). Of the 2,375 persons eligible to vote, 75.35 percent voted to approve Public Law 776. *Id.* Therefore, the land was transferred in fee to the United States after acceptance by the Tribe of Public Law 776.

C. Lands Acquired from Non-Indians.

In addition to the approximately 104,000 acres acquired from the Tribe and its members, approximately 18,000 acres were acquired from non-Indians under the Flood Control Act of 1944 in the "taken area." *See* H.R. Rep. No. 1047, 81st Cong., 1st Sess., 3 (1949) (Comments of the Department of Interior) (J.A. 185) (PTA O, 3). The record does not reflect how these lands originally came into non-Indian ownership.[2] Non-Indians did not receive the same kinds of damage payments as Indians nor did they receive rehabilitation funds.

---

[2] The lands could have come into non-Indian ownership through the General Allotment Act of 1887 as incorporated in the 1889 Sioux Act. Alternatively, they could have come into non-Indian hands through other statutes including those set out in *County of Yakima v. Yakima Nation*, ___ U.S. ___, 116 L.Ed.2d 687, 705 (1992). *See* 25 U.S.C. §§ 320, 379, 404 and 405.

See, e.g., May 20, 1954 Hearing, *supra* at 160 (J.A. 202-203) (PTA RR, 160).

D. Subsequent History of the Taken Area.

In the years following the taking, the State of South Dakota vigorously managed the waters and lands of the taken area. With regard to the Oahe fishery, the State has closely monitored the changes in habitat and morphology which occurred as a result of the creation of the reservoir, *see, e.g.*, (T 9, 131-134) (J.A. 333), and has refined its management accordingly. For example, as the District Court found, South Dakota stocked about 72 million fish in the reservoir from 1970 through the time of trial in 1988 (J.A. 78). *See* (Ex. 114). Further, the District Court noted the "numerous" studies the State conducts on the reservoir (J.A. 78). Studies include reservoir fish population surveys, catch rate studies, harvest rate studies and studies of the introduction of fish (J.A. 78). Fishery studies are used in regulatory decision making, i.e., size and number limits for fishing. *See id.* The State has closely monitored the progress of the pallid sturgeon (T 104-105) (J.A. 338-341), a fish species in the process of being listed as endangered (T 109). *See also* DCO (District Court opinion) (J.A. 78-79). Through South Dakota's management, the Oahe walleye and northern pike fishing has been developed into an asset with a national reputation. *See* DCO (J.A. 78). *See also* (T 100-101) (J.A. 338). The State has also developed a small mouth bass population which is expected to become self-sustaining (T 25).

Finally, the District Court found that South Dakota "furthers fishery management" through "[e]nforcement of fishing regulations." (J.A. 79). This includes, of course, regular law enforcement activities such as arrest and imposition of sanctions on the fishery. *See* (PHT 146-147, T 304-305, Ex. 140). As biologist Robert Hanten stated: "If there were no regulations and there were no enforcement there would be uncontrolled exploitation of the fish population." (T 8) (J.A. 332); *see also* (T 65, 67) (J.A. 334-335).

Likewise, the State engages in sophisticated game management including law enforcement throughout the fee land and taken area land. As the District Court found:

> The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

(J.A. 77). *See* (PHT 78-79; T 364). See also as to law enforcement on taken area land, DCO (J.A. 66, 79) (PHT 127, 144-146, T 442, 444, Ex. 140).

The Tribe, in contrast, has done little if anything to contribute to the management of the taken area. With regard to the Missouri River, a BIA researcher stated in Lawson, *Reservoir and Reservation: the Oahe Dam and the Cheyenne River Sioux*, 37 S.D. Historical Collections 102, 158 (1974):

> Though the river contained a wide variety of fish, the Indians never learned to exploit this food source and forms of water recreation such as swimming and boating were also uncommon activities.

Similarly, House and Senate Reports made it clear that "[f]ishing is not important on either reservation at the present time." H.R. Rep. No. 1047, 81st Cong., 1st Sess., 4 (1949) (J.A. 186) (PTA O, 4). *See also* S. Rep. No. 1737, 81st Cong., 2d Sess., 5 (1950) (PTA N, 5). At the time the litigation was commenced the Tribe had never done *any* stocking of fish on the Missouri River, had never done fish surveys, species composition surveys or reproduction surveys on the Missouri River, and had no docks or ramps going to the Missouri River. *See* (T 506-507) (J.A. 361-362), (T 520-521) (J.A. 379); *see also* DCO (J.A. 74, 76). The Tribe admitted that it had no plans for development of the Missouri River fishery at the

time of trial of this matter even though it presented a newly adopted wildlife plan to the court at that time (T 839-840) (J.A 381-382).

Tribal management of wildlife was virtually nonexistent throughout the reservation at the time the litigation was brought. The District Court found at (J.A. 74):

> Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population data were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

See also (T 509-521) (J.A. 362-379).

At the time of trial, no non-Indian had ever been prosecuted in a civil or criminal court of the Tribe for a hunting or fishing violation on any area of the reservation including, necessarily, the taken area lands and waters. *See* (T 517-518) (J.A. 373-375) (T 548-549) (J.A. 380).[3]

E. Commencement of the Litigation.

This litigation was begun by the State when the Tribe broke off negotiations on a proposed agreement and announced to the local media

> Due to the state of South Dakota's intransigence, all hunters must now hold a Cheyenne River Sioux tribal hunting license to hunt on *any and all lands* within the exterior boundaries of the reservation.

[3] The District Court made a general finding that the Tribe "enforced its [hunting and fishing] regulations against all violators" on the lands in dispute (J.A. 66). The court, however, made no findings as to the frequency, vigor or manner of the tribal enforcement. (*See*, as to the low level of tribal activity, the District Court Memorandum Opinion which denied a preliminary injunction, at Pet. App. A-171). The Court of Appeals did not analyze these District Court's findings, nor did it adjudge the appropriate meaning or weight to be given them in a *Montana-Brendale* analysis presumably because its principal analysis was based on *United States v. Dion*, 476 U.S. 734 (1986), as set forth below.

> The state licenses will no longer be honored and violators are subject to prosecution in tribal court.

DCO (J.A. 58) (emphasis added).

In response to this threat, the District Court granted a temporary restraining order blocking the tribal officers from restraining "non-Indians possessing state hunting licenses from hunting on non-Indian or public lands within the Cheyenne River Sioux Indian Reservation." (Pet. App. A-183).

F. Decisions Below.

The District Court found, on the merits, that the Tribe had no civil regulatory jurisdiction over non-Indians hunting or fishing on any of the taken area.[4] (J.A. 149-150). The District Court applied the "general principle" of *Montana* to the taken area, stating that "unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe." (J.A. 117-118). Finding no such delegation in the Cheyenne River Taking Act of 1954 or in other legislation, the District Court held that the Tribe had no civil regulatory jurisdiction over non-Indians on the taken area.

The District Court also found, in considering the *Montana* "exceptions," that the "taken area and fee lands are not substantial food sources for tribal members," (J.A. 70) and that "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by

[4] The District Court also found that the Tribe did not have civil regulatory jurisdiction over non-Indians on fee land on the main portion of the reservation (J.A. 121). The Tribe did not appeal this determination. In addition, the District Court found that the reservation had not been diminished by the 1954 Taking Act (J.A. 103-104); the State did not appeal this portion of the decision. It should also be noted that the Court of Appeals overturned the holding of the District Court that the Tribe did not have civil regulatory jurisdiction over nonmember Indians. The Court of Appeals found that the issue had not been properly raised below. *Bourland*, 949 F.2d at 989-990 (Pet. App. 18-19).

tribal members for subsistence purposes." (J.A. 70). The District Court likewise found that "[t]ribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes." (J.A. 68). Further, it found that "[g]enerally, nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and the protection of other property." (J.A. 71). The court concluded that "the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic security or health or welfare." (J.A. 81-82). *See also* (J.A. 149).[5]

The Court of Appeals for the Eighth Circuit affirmed in part, reversed in part and remanded in part. The Court of Appeals drew a sharp distinction between lands acquired from the Tribe and its members and lands acquired from non-Indians. The Court of Appeals reversed the District Court and found that the Tribe could exercise civil regulatory jurisdiction over non-Indians on the approximately 104,000 acres of land and overlying waters taken from Indians by the United States for construction and operation of the Oahe reservoir under the Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954) (Pet. App. A-195). The Court of Appeals refused to rely upon this Court's decisions involving tribal assertions of civil regulatory jurisdiction over non-Indians on fee land: *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989). *Bourland*, 949 F.2d at 990, 994 and n.18 (Pet. App. A-26, 27, 39-41 and n.18). Instead, the

[5] The District Court also addressed the issues raised by the opinion of Justices Stevens and O'Connor in *Brendale*, 492 U.S. at 433-448, and found that "Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or fee lands." (J.A. 79).

Court of Appeals analyzed the jurisdictional issue principally in terms of *United States v. Dion*, 476 U.S. 734 (1986), a case involving abrogation of a treaty right of an Indian to hunt eagles. *Bourland*, 949 F.2d at 994 (Pet. App. A-40). Applying the *Dion* standard, the Court of Appeals concluded that the Tribe "retains" civil regulatory authority over non-Indians on lands acquired from Indians in the taken area because Congress had not, in acquiring these lands, expressly considered the conflict between its actions and treaty rights and had not expressly abrogated the treaty right. *Bourland*, 949 F.2d at 994 (Pet. App. A-40 - 41).

The Court of Appeals addressed the 18,000 acres of the taken area property acquired in fee from non-Indians in a decisively different manner. The circuit court remanded the issue of whether the Tribe had civil regulatory jurisdiction over non-Indians on the taken area property acquired from non-Indians in fee. The District Court was directed to make a new analysis of the existence of the *Montana* "exceptions." (Pet. App. A-46 n.20, -51).

SUMMARY OF ARGUMENT

1. *Montana v. United States* and *Brendale v. Confederated Tribes* establish that a tribe's claim to civil regulatory jurisdiction must flow either from positive federal law, such as a treaty, or from the inherent sovereignty of the tribe. These cases also establish that a treaty right to regulate non-Indians can exist, if it exists at all, only on lands over which the tribe has "absolute and undisturbed use and occupation." *Montana v. United States*, 450 U.S. at 559.[6] One hundred four thousand acres of land in this case were acquired from the Tribe and its members under the authority of the Flood Control Act of 1944 and the Cheyenne River Act of 1954. Pursuant to Section 4 of the Flood Control Act of 1944 and to

[6] *Montana* does not *hold* that a right to regulate can be derived from a treaty right to exclude; this derivation was treated as only an "arguable" one in *Montana*, 450 U.S. at 558-559. There does not appear to be any precedent of this Court squarely analyzing or deciding this issue.

Section X of the 1954 Cheyenne River Act, the Tribe no longer retains "absolute and undisturbed use" of these lands for they are open for public use for hunting and fishing under these Acts. It necessarily follows that the Tribe can have no power emanating from the treaty to regulate non-Indians on these lands and overlying waters. Nor can the Tribe exercise authority over non-Indians on these lands as a component of its inherent sovereignty. Under *United States v. Wheeler*, 435 U.S. 313 (1978), *Montana* and *Brendale*, it is clear that the inherent sovereignty of the Tribe extends only to its *internal* relations, i.e., the relations of the Tribe and its members. The inherent sovereignty of the Tribe does not extend to its external relations, for that authority has been divested. It follows, therefore, that the Tribe can have no civil regulatory jurisdiction over non-Indians on the lands and overlying waters acquired from the Tribe or its members under the two acts, under either the treaty power or the inherent sovereignty power.

2. The Court of Appeals consequently erred when it refused to apply the reasoning of *Montana* and *Brendale* to the issue of whether a tribe retains civil regulatory jurisdiction over non-Indians on the taken area. The apparent grounds for the refusal was that the Cheyenne River Act of 1954 was not enacted with the "destruction" of tribal government in mind. Such a purpose is not required under *Montana* or *Brendale*. Furthermore, even if the ultimate "destruction" of the tribal government is required to be a goal prior to application of *Montana* and *Brendale*, such was the case with the 1954 Cheyenne River Act as indicated by its legislative history. In addition, the minor rights and privileges retained by the Tribe in the taken area do not provide grounds for distinguishing *Montana*.

3. The Court of Appeals also erred in applying the reasoning of *United States v. Dion* to the matter of tribal civil regulatory jurisdiction over non-Indians. *Dion* addresses a distinct issue: whether the tribe and its members retain a right to engage in a particular nongovernmental activity, i.e., eagle

hunting. *Montana* and *Brendale* are directed to the far different issue of whether the tribe maintains civil regulatory jurisdiction over nonconsenting non-Indians and nonmembers. Application of *Dion* to the *Montana-Brendale* situation would undermine the logic and conceptual clarity of those cases. Alternatively, even if *Dion* is applicable to this situation, the Court of Appeals failed to find the 1954 Cheyenne River Act was the legal equivalent of the Eagle Protection Act. In the 1954 Cheyenne River Act, Congress specified that the Tribe would have but a right of "access" to hunt and fish on the taken area subject to "regulations governing the corresponding use by other citizens of the United States." By specifying the rights that the Tribe and its members would have after adoption by Congress and approval by the Tribe of Public Law 776, Congress precluded a claim that the Tribe *itself* could regulate others on that same taken area, under the *Dion* holding. The nonexclusive right to access is a far cry from the right to regulate.

4. Finally, the Court of Appeals erred in not applying the rule of *Montana-Brendale* as set forth above to the eighteen thousand acres of the taken area which were acquired from non-Indians. Under the rule of *Montana-Brendale*, the Tribe lost any claim to jurisdiction when the original acquisition by non-Indians took place. There is no arguable claim that the Tribe somehow *regained* jurisdiction by virtue of acquisition of these lands from non-Indians by the United States.

ARGUMENT

I

MONTANA v. UNITED STATES AND *BRENDALE v. CONFEDERATED TRIBES AND BANDS* PROVIDE THE APPROPRIATE STANDARD FOR DETERMINING WHETHER A TRIBE HAS CIVIL REGULATORY JURISDICTION OVER NON-INDIANS ON LANDS AND OVERLYING WATERS ACQUIRED IN FEE BY THE UNITED STATES IN THE TAKEN AREA.

Montana v. United States, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian*

Nation, 492 U.S. 408 (1989) set out the appropriate test for determining whether non-Indians are subject to the civil regulatory authority of the Tribe on lands no longer held in trust for the Tribe and its members, regardless of whether the land was acquired from Indians or non-Indians. That test is clear. A tribe has no "arguable"[7] claim to civil regulatory power over non-Indians under the treaty power unless the tribe maintains "absolute and undisturbed use and occupation" of the lands involved. Likewise, a tribe has no civil regulatory jurisdiction over non-Indians under its inherent sovereignty because the tribe has been divested of its authority over its "external relations" or its relations with non-Indians.

A. *Montana v. United States* Establishes that the Tribe has no Civil Regulatory Jurisdiction over Non-Indians on Non-Indian land, Either Under the Treaty Power or Inherent Sovereignty.

In *Montana v. United States*, 450 U.S. 544 (1981), this Court focused its attention on whether and under what conditions a tribe could exercise civil regulatory jurisdiction over non-Indians on non-Indian land. The question presented was, in particular, whether the tribe could exercise civil regulatory authority for hunting and fishing purposes on fee lands which had been acquired under the General Allotment Act of 1887 and the Crow Allotment Act.

The Court considered two potential "sources" for tribal regulatory authority – positive federal law, i.e., treaty,[8] and the inherent sovereignty of the tribe.

---

[7] Again, it is necessary to assume that a tribe may derive a power to regulate from a treaty power to exclude, an "arguable" proposition, *Montana v. United States*, 450 U.S. at 558-559. As the Brief of Amici States points out, treaties were negotiated to insulate the Indians from non-Indians. Implying a power to regulate non-Indians not expected to reside on or even enter the reservation is inconsistent with the basic premise of the treaties.

[8] The Court also considered and rejected the argument that 18 U.S.C. § 1165 conferred or "augmented" the tribe's regulatory authority. *Montana*, 450 U.S. at 561-562.

1. A tribe cannot make even an arguable claim to civil regulatory jurisdiction over non-Indians under the treaty power unless it maintains exclusive use of the lands involved.

Montana clearly sets out the rule for determining whether a tribe may exercise jurisdiction over non-Indians on a reservation under a treaty power, assuming such power may be derived from the tribal exclusivity provision. The rule is that a tribe may not exercise civil regulatory jurisdiction over non-Indians on any lands over which it does not have "absolute and undisturbed use and occupation" under a treaty provision.

The treaties analyzed in *Montana* are directly relevant to this case. The first treaty relied upon in *Montana* was the Treaty of Fort Laramie of 1851, 11 Stat. 749 (1851); 2 Kappler 594. Both the rights of the Crow at issue in *Montana* and the rights of the Cheyenne River Sioux at issue in this case were addressed by this treaty. According to this Court, only Article V of the Fort Laramie Treaty referred to hunting and fishing

> and it merely provided that the eight signatory tribes [including the Crow and Sioux] "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595. The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands.

Montana v. United States, 450 U.S. at 558 (footnote omitted). The 1851 Treaty gave no support to the Crow claim in *Montana* and gives no support to the claim of the Sioux in this case that a right had been granted or reserved to the Tribe to regulate hunting and fishing by nonmembers on nonmember lands.

The second treaty at issue in *Montana* was the 1868 Fort Laramie Treaty, 15 Stat. 649 (1868); 2 Kappler 1008. According to the Court, Article II of this treaty established a reservation for the Crow Tribe and provided that it be

> "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for

> such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . . ," (emphasis added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized to do so . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . . "

Montana v. United States, 450 U.S. at 558 (quoting 15 Stat. 649). The Treaty with the Sioux Indians was signed on April 29, 1868, less than two weeks before the second Fort Laramie Treaty with the Crow Indians. The provision relating to exclusive use is almost identical to that used with regard to the Crow Indians.[9] According to the Court in *Montana*, this treaty language, by obligating "the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the tribe" had the effect of

---

[9] The Sioux Treaty states that the described country is

> set apart for the *absolute and undisturbed use and occupation of* the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that *no persons except those herein designated and authorized to do so*, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article*, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

Treaty with the Sioux Indians, 15 Stat. 535, 536 (Apr. 29, 1868); 2 Kappler 998 (emphasis added).

"arguably" conferring "upon the Tribe the authority to control fishing and hunting on those lands." *Montana*, 450 U.S. at 558-559.

The Court went on to hold, critically,

> But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."

450 U.S. at 559. This Court thus found that when a tribe did not have "absolute and undisturbed use" of land, the power "arguably" created or reserved under the 1868 Treaty to "control fishing and hunting on those lands" no longer existed. The Court pointed to the substantial reduction in "such land," 450 U.S. at 559, as a result of the allotment and alienation of land under the General Allotment Act and the Crow Allotment Act of 1920. The Court concluded that

> If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559 (footnote omitted). The same result follows under the near mirror image language of the Treaty of Sioux Indians, *see* n.9 *supra*, at issue here.

2. Montana establishes that a tribe has no jurisdiction over non-Indians on non-Indian lands under its inherent sovereignty because such inherent sovereignty has been divested.

Montana also examined whether the tribe, as "an incident of the inherent sovereignty of the tribe" could "regulate non-Indian hunting and fishing on non-Indian lands within the reservation." 450 U.S. at 563. Approaching this issue, the Court examined the principles set out in *United States v. Wheeler*, 435 U.S. 313 (1978) which distinguished between inherent sovereignty over external relations, or relations between the tribe and nonmembers of the tribe – and inherent sovereignty over internal relations or, in other words, relations among members of the tribe.

The Court found that the "areas in which such implicit divestiture of sovereignty has been held to have occurred are

those involving *the relations between an Indian tribe and nonmembers of the tribe. . . . "* *Montana*, 450 U.S. at 564 (quoting *Wheeler*, 435 U.S. at 326) (emphasis added in *Montana*). The Court explained, again quoting *Wheeler*,

> "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.*"

Id. (emphasis added in *Montana*). This Court stated that the

> exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564.

Montana thus established a general rule for determining when a tribe might have civil regulatory jurisdiction over non-Indians, a rule which carefully takes into account both treaty rights and inherent rights.[10]

3. *Brendale v. Confederated Tribes* and *Bands of the Yakima Indian Nation* reaffirms and refines the rule of Montana.

Brendale, like *Montana*, examines the treaty power and the inherent sovereign power of the tribe to determine the circumstances under which a tribe may impose civil regulatory jurisdiction over non-Indians. The *Brendale* plurality thus first examines whether the Treaty of the Yakima Nation with the United States established tribal authority to regulate fee land owned by nonmembers within the reservation. As in *Montana*, the basis for the treaty argument was language

---

[10] The two *Montana* "exceptions" arguably justifying a tribal claim of inherent sovereign authority are addressed in the section immediately below.

which stated that particular property would be set apart "for the exclusive use and benefit" of the tribe, and that no "white man excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe." *Brendale*, 492 U.S. at 422. The plurality found that the Yakima Nation could not rely upon "this power to exclude" because the tribe

> no longer retains the "exclusive use and benefit" of all the land within the reservation boundaries established by the treaty with the Yakimas.

Brendale, 492 U.S. at 422. According to the *Brendale* plurality, significant portions of the Yakima Indian Reservation had been allotted under the General Allotment Act, and had passed to non-Indians. Quoting *Montana*, the *Brendale* plurality stated that

> "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands."

Brendale, 492 U.S. at 422 (quoting *Montana*, 450 U.S. at 561). The *Brendale* plurality also found that the *Montana* court

> flatly rejected the existence of a power, derived from the power to exclude, to regulate activities *on lands from which tribes can no longer exclude nonmembers.*

Brendale, 492 U.S. at 424 (emphasis added).

The four justice plurality also examined whether the tribe had a power emanating from its "inherent sovereignty" to regulate nonmembers on non-Indian lands. *Brendale*, 492 U.S. at 425. As in *Montana*, the Court distinguished between inherent sovereignty with regard to external relations, or relations with nonmembers – and inherent sovereignty with regard to internal relations. The *Brendale* plurality found

> A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations."

Brendale, 492 U.S. at 425-426 (quoting *United States v. Wheeler*, 435 U.S. at 336).

The *Brendale* plurality also examined *Montana's* "two 'exceptions' to its general principle" regarding the inherent sovereignty of the tribe. 492 U.S. at 428. The first "exception" relating to consensual relations was not alleged to be present.[11] The *Brendale* plurality then examined the second *Montana* "exception" that

> "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

492 U.S. at 428 (quoting *Montana v. United States*, 450 U.S. at 566.) The *Brendale* plurality rejected the broad reading of the Ninth Circuit that "all conduct that 'threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe' " gave rise to tribal jurisdiction. 492 U.S. at 429. Such an approach, according to the *Brendale* plurality, equated the tribe's "retained sovereignty with a local government's police power, which is contrary to *Montana* itself." 492 U.S. at 429. The *Brendale* plurality thus found that

> The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.

492 U.S. at 430.

---

[11] The results of the three major cases regarding tribal civil regulatory jurisdiction leading up to *Brendale* can be reconciled on the basis of consent to tribal civil jurisdiction through entry onto trust land. In *Washington v. Confederated Tribes*, 447 U.S. 134, 152 (1980), this Court found tribal jurisdiction to impose a tax on a transaction "occurring on trust lands." In *Montana*, the Court held against tribal jurisdiction on non-Indian lands but found also that the tribe could regulate non-Indians on "land belonging to the tribe or held in trust for the tribe." 450 U.S. at 557. In *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 133 (1982), the non-Indian company which had contracted with the tribe and which had entered on "tribal trust property," was liable for a tribal tax.

The *Brendale* plurality thus concluded that the *Montana* second exception did not give rise to tribal court jurisdiction[12] and that federal common law created an interest protectible both in state and federal tribunals. It also noted that when the impact of a particular non-Indian activity was "demonstrably serious" and imperiled the political integrity, economic security, or health and welfare of the tribe, a *federal court* would have jurisdiction of a cause of action to restrain such activity.

Thus, the *Brendale* plurality completed the task begun in *Montana* of setting out a bright-line rule as to when the tribe would have civil regulatory jurisdiction over non-Indians.[13]

---

[12] Even if the *Montana* second exception *could* give rise to tribal civil regulatory jurisdiction, it would not so operate in this case given the District Court's extensive findings on the issue, and especially the finding that the Tribe "need not regulate the hunting and fishing activities of nonmembers on the taken area . . . to protect its political integrity, economic security, or health or welfare." (J.A. 81-82). *See also* (J.A. 70, 71, 75, 149).

[13] *Montana* and *Brendale* do not preclude tribal jurisdiction over non-Indians in all situations. Tribal jurisdiction may exist when the nonmember has *consented* to jurisdiction of the tribal government or tribal courts. *See supra* n. 11. The case for consent will presumably be the strongest when the non-Indian has voluntarily and knowledgeably entered onto trust land or when the non-Indian has consented to tribal jurisdiction in a contract. Tribal civil regulatory jurisdiction over non-Indians may also exist when Congress delegates such jurisdiction to the tribe, although such delegation must be consistent with the principles set out in *Duro v. Reina*, 495 U.S. 676, 693-694 (1990).

4. Application of the bright-line *Montana-Brendale* rule precludes a tribal claim to civil regulatory jurisdiction over non-Indians on the taken area property acquired from the Tribe and its members in this case.

As demonstrated above, the first prong of the *Montana-Brendale* rule allows an "arguable" tribal claim to civil regulatory jurisdiction over non-Indians based upon a treaty right only when the land over which jurisdiction is claimed is held for the "exclusive use and benefit" of the Tribe or its members. When that underlying treaty right to such use and possession is divested, any arguable derivative right to regulate is necessarily divested.

Two statutes preclude such a claim here. Section 4 of the Flood Control Act of 1944, Pub. L. 534, 58 Stat. 889 (1944) § 4, 16 U.S.C. § 460(d) (Pet. App. A-185-A-186) requires that the "water areas of all such reservoirs shall be opened to public use generally." The 1954 Cheyenne River Act, 68 Stat. 1191 at § 10 (J.A. 244) states that

> The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*

(Emphasis added.) Congress thus opened the area to non-Indians and no question exists that the Act abrogated the Tribe's right to territorial exclusivity over these lands. The Court of Appeals, in construing similar language with regard to another taking act on the Missouri River downstream of the Oahe project, stated that "the treaty right to exclusive occupation and use of reservation land is necessarily taken from an Indian tribe when a federal flood control project, which is also used for recreational activities by all persons, is constructed on the reservation." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 826 (8th Cir. 1983). The Court of Appeals found in the case now before this Court that the Tribe was not "free entirely to exclude non-Indians" from the taken

area, even under its incorrect decision. *Bourland*, 949 F.2d at 995 (Pet. App. A-42). Accordingly, the Tribe has no civil regulatory power deriving from treaty over non-Indians in the taken area in this case.

The second prong of the *Montana-Brendale* rule allows an "arguable" claim of tribal civil regulatory jurisdiction based on the inherent sovereignty of the tribe. That inherent jurisdiction, however, extends only to a tribe's internal relations because a tribe's inherent sovereignty over external relations, or relations between a tribe and non-Indians, has been divested as a result of its dependent status. *See Montana*, 450 U.S. at 564; *Brendale*, 492 U.S. at 425-426 (White, J., concurring). Thus, the Tribe cannot claim civil regulatory jurisdiction over non-Indians on the taken area in this case.[14]

B. History and Policy Support the Rationale of *Montana-Brendale*.

1. Basic principles of American democratic tradition and theory and of Indian law support the limitation of tribal authority over non-Indians.

The historical underpinnings of the decisions in *Wheeler*, *Montana* and *Brendale* limiting assertions of tribal authority

---

[14] The preclusion of tribal civil regulatory jurisdiction over non-Indians on the taken area is also in accord with the opinion of Justices Stevens and O'Connor in *Brendale* which views the tribal power of exclusion as giving rise to a power to regulate. *Brendale*, 492 U.S. at 433. In this case, the Tribe has no right to exclude non-Indians from the taken area land and water under Section X of the 1954 Cheyenne River Act as demonstrated above. When the power to exclude is not present, the power to regulate nonmembers is present only in a "closed" area of the reservation under the opinion of Justice Stevens. *See*, as to the use of this term, *Brendale*, 492 U.S. at 437 n.2 (Stevens, J.) The District Court found none of the characteristics of such an area to exist in the taken area. *See* (J.A. 79). *See also*, n.5, *supra*. It follows that the Tribe cannot exercise civil regulatory jurisdiction over non-Indians on the taken area under the opinion of Justice Stevens in *Brendale*.

over nonconsenting non-Indians are preconstitutional and find expression in the Declaration of Independence itself.

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed*. . . .

Declaration of Independence para. 2 (July 4, 1776) (emphasis added). The thesis underlining the Declaration of Independence, that governments derive their power from the consent of those who are governed,[15] found an echo, the State submits, in the first Indian law case confronted by this Court. In that case, Justice Johnson, concurring in *Fletcher v. Peck*, 6 Cranch 87, 147 (1810) stated that

> [t]he restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; *and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.*

(Emphasis added.) Justice Johnson thus defined the scope of tribal sovereignty to extend only to the tribal members themselves, or, in other words, to those who had actually consented to tribal jurisdiction through that membership. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978). The logic and persuasive force of the Declaration and of *Fletcher v. Peck* found expression in the general law context in *Nevada v. Hall*, 440 U.S. 410, 426 (1979), in which this Court stated: "In this Nation each sovereign governs only with the consent of the governed." Even more recently in *Duro v. Reina*, 495 U.S. 676, 693 (1990), this Court, in the context of an Indian criminal law case, expressed the view that the

> retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who *consent* to be tribal members.

---

[15] The United States Constitution is itself an embodiment of that idea.

(Emphasis added.)[16] Adding to the force of this argument[17] is the frank recognition of this Court that tribal courts are simply different from other courts.

> While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." Cohen 234-335. *It is significant that the Bill of Rights does not apply to Indian tribal governments.*

Duro v. Reina, 495 U.S. at 693 (emphasis added).

Confining the scope of tribal sovereignty to its internal relations, i.e., to the relationship of the Tribe with those who consent to be its members, appropriately honors the concept of "consent of the governed" which is an integral part of American democratic theory and Indian law. It also serves the purpose of insulating nonmembers from processes which are "influenced by the unique customs, languages, and usages of the tribes," and courts which are "subordinate to the political branches" of the tribal governments.[18]

---

[16] As held in *United States ex rel. Standing Bear v. Crook*, 25 Fed. Cas. 695 (CCD Neb. 1879), a member of the tribe is free to terminate the tribal relation at will. *See also* Tribe, *American Constitutional Law*, (2d ed. 1988) p. 1472 n.32.

[17] *See also In re Duncan*, 139 U.S. 449, 461 (1891); *The Federalist* No. 39 (James Madison). The idea of consent of the governed is no longer a peculiar American one but has been embraced throughout the world. *See generally, Universal Declaration of Human Rights*, Art. 21(1).

[18] In 1986, testimony was taken before the United States Commission on Civil Rights that tribal judges had been removed or suspended from office by the tribal council for their official acts. *See Hearing before the United States Commission on Civil Rights, Enforcement of the Indian Civil Rights Act, Hearing held in Rapid City, South Dakota, July 31-Aug. 1 and Aug. 21, 1986* (PTA QQ); (CRST Judge Gilbert LeBeau (removed), *id.* at 139, 149); (CRST Judge Nancy Condon (suspended), *id.* at 368-370). It is also of note that the CRST President, Wayne Ducheneaux, was unable to

Recognition of this principle also allows tribal courts proper sway over their own members who have consented to tribal governance by maintaining tribal membership; moreover, non-Indians who *do* in fact "consent" to the jurisdiction of the tribe for one or another purpose may also be brought under tribal civil regulatory jurisdiction through this "consent." *See* discussion at footnotes 11 and 13, *supra*.

2. Application of the *Montana-Brendale* rule in this case furthers resolution of jurisdictional disputes and promotes coherent regulation of federal lands and waters and the resources found thereon.

Not only is the bright-line *Montana-Brendale* rule internally logical and historically justified, but the adoption and endorsement of the rule here could well alleviate tensions which exist on Indian reservations throughout the West (and, in some instances, now in eastern states). Non-Indians reside, travel, do business, hunt, fish, and perform various other activities on reservations throughout the United States in their capacity as citizens of the United States. For example, according to the 1990 census statistics, 34.1 percent of the population of the Cheyenne River Sioux Reservation is non-Indian, and, of the portion of the Standing Rock Reservation which is in South Dakota, (i.e., all of Corson County), 51.5 percent is non-Indian. 1990 United States Census of Population & Housing, Summary Tape File 1A, South Dakota, 040. As noted in *Duro*, 495 U.S. at 695, "the population of non-Indians on reservations generally is greater than the population of all Indians, members and nonmembers . . . ." Similarly, non-Indians are important property holders on reservations. The District Court found that "1,395,729 acres or 46.5 percent" of the land base on the Cheyenne River Sioux Reservation "is deeded in fee to members and nonmembers." (J.A. 64). *See generally Solem v. Bartlett*, 465 U.S. 463

recall any instance, except, perhaps, involving "638" contracts, in which the tribe had waived its sovereign immunity. (T 550).

(1984). The legitimate presence of non-Indians as residents, property owners and visitors brings with it the need to define jurisdictional parameters. Explicit application of the bright-line rule to all land not held for the "exclusive use and benefit" of the Tribe or its members could thus greatly add to the stability of reservations and the stability of the relationship between the Indian and non-Indian population by making jurisdictional outcomes more certain.

There are, moreover, special reasons to apply the bright-line *Montana-Brendale* rule to federal lands and waters and especially those of a great national waterway – the Missouri River. Members of the public utilizing massive federal projects on navigable waters should not, as a matter of public policy, be subjected to the claims of competing jurisdictions as would occur should the rule of the Eighth Circuit in this litigation be applied up and down the Missouri River.

Under the circuit court decision, for example, a boater or fisher traveling northward from Pierre, South Dakota, to the North Dakota border may encounter three different jurisdictions – that of the State, the Cheyenne River Sioux Tribe (presumably claimed to the midpoint of the channel adjoining the reservation)[19] and the Standing Rock Sioux Tribe (again, presumably to midchannel). The three jurisdictions may require three different fishing and, perhaps, boating licenses.

Of even more importance is the biological effect that different take limits may have with regard to the prominent game fish, such as walleye. For example, one tribe could impose a very low limit, thereby inappropriately encouraging heavy fishing in other areas of the reservoir. Conversely, a tribe could allow very high limits on walleye or could simply

[19] The tribal boundary presumably lay in the middle of the channel before the construction of the Oahe Reservoir. Whether the construction of the Oahe Reservoir, an "unnatural" event, altered that boundary is not clear. *See generally Arkansas v. Tennessee*, 397 U.S. 88 (1970); *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

do little or no enforcement,[20] therefore seriously jeopardizing the resource available to other South Dakotans, assuming the State is unable to retain even concurrent jurisdiction in the taken area.[21] The State demonstrated at trial the necessity of managing the entire reservoir system in South Dakota as one fishery unit. *See* (T 235-236). It follows that the management of a single reservoir as a unit is of even greater importance; fish do not observe jurisdictional boundaries. The State submits that cohesive, coherent management of the fishery in the State of South Dakota would serve the national purposes implicit in the Flood Control Act of 1944 and the 1954 Cheyenne River Taking Act, especially Section X; likewise, it will further the goals in other federal acts, such as the Fish and Wildlife Conservation Act of 1980, 16 U.S.C. § 2901 et seq., and the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., which seek to promote fish and wildlife in cooperation with the states.

---

[20] The District Court found that "enforcement of fishing regulations [by South Dakota Game, Fish and Parks] also furthers fisheries management." (J.A. 79), and the record reflects that South Dakota has established and enforced regulations on the reservoirs since they began to fill (T 7-8, J.A. 331).

[21] The Tribe successfully resisted the State's contention that the issue of state authority over non-Indians in the taken area had been properly raised in the litigation below. *See* (J.A. 107-110); *see also Bourland*, 949 F.2d at 990 n.13 (Pet. App. A-20, n.13). (The State, of course, claimed exclusive, not concurrent jurisdiction, over non-Indians.) In any event, if the tribal respondents prevail in the present litigation, the stage is set for further litigation, presumably brought by the Tribe or some other person or entity, to challenge the viability of the State's exercise of concurrent jurisdiction in the "taken area" in the hunting and fishing context. *See generally United States v. Montana*, 604 F.2d 1162, 1171 (9th Cir. 1971), *rev'd, Montana v. United States*, 450 U.S. 544 (1980).

3. Application of *Montana-Brendale* here assures equal treatment for all persons on property belonging to the United States.

Finally, consistent with elementary democratic principles, the Tribe has a heavy burden when it asks the federal courts to sanction the imposition of civil regulatory jurisdiction[22] over non-Indians on public lands and waters when it, the Tribe, systematically excludes those non-Indians from participation in the tribal government regardless of their residence. This point takes importance in view of the finding by the District Court that:

> The tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters. . . . The discriminatory license fees apply to nearly every animal hunted or trapped on the reservation.

(J.A. 80). In addition, this Tribe at trial asserted through its Chairman the authority to open wildlife seasons on the public

---

[22] Although there was no evidence that the Tribe had ever actually imposed sanctions on non-Indians at the time the litigation was commenced, it is of note that the tribal ordinance in effect at that time provided that various hunting and fishing ordinance violations would be "a civil offense" (Ex. 8, p. 4) and would subject the violator to "fines," "confiscation and forfeiture of equipment, and expulsion of nonresident nonmembers from the reservation." *Id. See also* (Ex. 2, § 2.c., Tribal civil forfeiture ordinance adopted after the commencement of this litigation; Ex. 13, p. 11, 1989 Tribal Hunting, Fishing and Outdoor Recreation Code.) Under these ordinances the Tribe could presumably seize and sell expensive fishing equipment and boats used on the Missouri. Further, at the commencement of this litigation, the tribal ordinance provided for fines which ranged from two dollars per inch for fish, to fifty dollars per female pheasant, to $300 per female deer or antelope taken without compliance with tribal law. (Ex. 7, p. 2). The tribal fine or "civil penalty" for female pheasants was increased to $150 in 1989, and the fine for female deer or antelope was raised to $1,000 (Ex. 13, p. 10).

"taken area" lands and waters itself to its members and to close them to nonmembers.[23] (T 549-550) (J.A. 380-381).

The State, in sum, submits that the bright-line rule of *Montana-Brendale* is justified by history, precedent, and reason. The rule should be applied to the taken area and to all public lands and waters of the United States.

---

[23] The Court of Appeals did state the following in its opinion:

> This is not to say, however, that the Tribe is free entirely to exclude non-Indians from hunting and fishing on the portion of the taken land over which it has control. The Tribe's "right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States." Cheyenne River Act, 68 Stat. 1193. Further, Section Four of the Flood Control Act requires that the "water areas of all such projects shall be open to public use generally." 16 U.S.C. § 460d. It appears, then, that the Tribe may not enact a flat ban on non-Indian hunting or fishing on the portion of the taken area subject to tribal jurisdiction, nor may it impose unreasonably discriminatory limits on such activities. The scope of the Tribe's regulations are not presently at issue, however, and so we decline to address this question further.

Bourland, 949 F.2d at 995 (Pet. App. A-42 – A-43). The court thus derived from Section X of the Cheyenne River Act and Section 4 of the Flood Control Act some limitations on tribal power. In particular, the circuit court apparently read language that the "Tribe's 'right to hunt and fish in and on the [Oahe Dam] shoreline and reservoir [is] subject, however, to regulations governing the corresponding use by other citizens of the United States' " to be a limitation on the Tribe's power over non-Indians. *Bourland*, 949 F.2d at 995 (Pet. App. A-42). The reading is perplexing, however, because this language clearly limits the right of the *Tribe and its members to hunt and fish and* does not address the right of *others to hunt and fish*. The circuit court's statements that the Tribe might not enact a "flat ban" on non-Indian hunting and fishing nor may it "impose unreasonably discriminatory limits on such activities," *Bourland*, 949 F.2d at 995 (Pet. App. A-43), are not particularly comforting to the State for they do, apparently, countenance bans less than "flat" and discrimination which is less than "unreasonable."

C. *Montana* and *Brendale* are not Distinguishable.

Two arguments have been raised in an attempt to distinguish the situation now before this Court from *Montana* and *Brendale*. Neither argument is persuasive.

1. *Montana* and *Brendale* are not distinguishable on the grounds that the General Allotment Act is not at issue in this case.

The State submits, contrary to the view of the circuit court, *Bourland*, 949 F.2d at 991 (Pet. App. A-26-A-27), that it is not important under *Montana* and *Brendale* that those two cases were decided in the context of the General Allotment Act; the logic of the rule relating to the treaty power and to inherent sovereignty apply generally. Even if the General Allotment Act is important to those cases, however, the 1954 Cheyenne River Act fits easily into that context. This is so because the 1954 Cheyenne River Act, like the General Allotment Act, contemplated "the eventual elimination" of tribal government.

The Cheyenne River Act was enacted in 1954. Just one year earlier, Congress had enacted H.R. Con. Res. 108, 67 Stat. B132 (July 27, 1953) which stated that the policy of Congress was "as rapidly as possible" to subject the Indians to the "same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States." *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 n.32 (1979). According to this Court, this "policy reflected a return to the philosophy of the General Allotment Act of 1887." *Id.*

That the 1954 Cheyenne River Act was itself part and parcel of this effort in the early 1950s through the 1960s[24] is

---

[24] Strickland, *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) p. 152 states that movement in the direction of termination had

demonstrated by the legislative history of the Cheyenne River Act. Representative E.Y. Berry of South Dakota, one of the principal sponsors of the Cheyenne River Act, directly tied the Cheyenne River Act to other legislation "which will terminate the Federal supervision over six groups of Indians." 100 Cong. Rec. 13160 (Aug. 3, 1954) (J.A. 220). According to Representative Berry,

> *This Congress has already passed legislation which will terminate the Federal supervision over six groups of Indians*, and I stress the point that in every instance the Indians themselves have either asked for this terminal legislation and have helped to work out the terminal program, or have given their assent to it. . . . The bill before us now is a bill which authorizes settlement for land damages on the Cheyenne Indian Reservation of the Sioux Tribe of South Dakota and authorizes a rehabilitation program for these people, *to put them in shape to where in a period of ten to fifteen years they, too, will be ready to throw off the shackles of Federal supervision.*
>
> . . . .
>
> The Indians will be moved back up on to the open prairie without protection from the elements. Dams and cisterns will have to provide their water supply. Their way of life will be completely changed. If, however, this settlement program works out as the Indians and the subcommittee have set it up, these people will become established, part of them will be relocated off of the reservation and *all of them will be placed in shape to handle their own affairs without supervision from the Indian Department in a period of possibly 10 or 15 years.*

100 Cong. Rec. 13160 (Aug. 3, 1954) (J.A. 220-226) (PTA PP) (emphasis added).

---

already begun in the late 1930s but that a "policy of rapid assimilation through termination was not officially adopted by the federal government until 1953." *See also id.* 811-818.

Clearly, the 1954 Congress wanted to improve the condition of tribal members through this Act for the purpose of moving them toward termination just as the 1887 Congress saw the implementation of the General Allotment Act as moving toward termination. Similarly, the Department of Interior, in its letter of March 19, 1954, printed at H.R. Rep. No. 2484, 83d Cong., 2d Sess. 13 (1954) (J.A. 218) (PTA T, 13), describing the facilities to be provided to the Indians stated,

> During this period of time [six to eight years] the situation of the Indians may change appreciably, *particularly in view of the national policy of terminating special federal services of a public nature to Indians by transfer of responsibility for such services to the States and their local subdivisions.*

(Emphasis added.) Indeed, the Tribe itself, in its "Memorial to the 83d Congress" stated that

> We are convinced that the time must come when the American Indian will cease to be the ward of the United States. . . . [T]he Sioux Tribe of the Cheyenne River Reservation *should be placed in a position to take over their own affairs and ultimately released as wards of the United States.*

(J.A. 189-190) (PTA Z, 35) (emphasis added).

Finally, it is not relevant that the termination policy of the fifties and sixties has now been reversed. In *Montana v. United States*, 450 U.S. at 559 n.9, the Court found that the policy of allotment and the sale of surplus reservation lands under the General Allotment Act had been repudiated by the Indian Reorganization Act of 1934. This Court nonetheless said "what is relevant in this case is the *effect of the land alienation* occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." *Id.* (emphasis added). The same is true here. In sum, insofar as it is necessary that a particular act manifest Congress' intent eventually to eliminate tribal government, the 1954 Cheyenne River Act reflects such intent.

2. *Montana* and *Brendale* are not distinguishable on the grounds that certain interests have been reserved to the Tribe.

The tribal officials have appeared to contend that because the Tribe retained certain interests in the land to which the United States took title, that the result should be different. *See* Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 14.

This argument is without merit. The rights under Sections VII and IX to remove salvage and timber and to occupy the taken area *expired* by the terms of the statute prior to the closing of the reservoir almost three decades ago. *See* Section IX. (J.A. 242-243). The right to extract minerals "subject to all reasonable regulations . . . for the protection and use by the United States of the taking area" (J.A. 240) does not constitute "exclusive use and benefit" of the Tribe of the area, and so no treaty right to regulate may be asserted on this basis.[25]

Members of the Tribe do have a right to graze stock on the taken area under Section X (Pet. App. A-205), but this right is again not one of exclusive use. Both the United States and the public may use that land pursuant to Sections II and X of the Act. Furthermore, a tribal right to *graze* on the *lands* surrounding the reservoir is entirely irrelevant to whether the Tribe may exercise civil regulatory jurisdiction over non-Indians on the *waters* of the Oahe Reservoir.

Members of the Tribe also have under Section X a right of "free access" for hunting and fishing purposes, but this right does not constitute a right of exclusive use; rather, it is a right to be exercised in common with the "other citizens of

---

[25] No mineral rights were "reserved" to the Tribe on lands acquired from non-Indians. (Tribal ownership of the bed of the Missouri at the time of the Act is not a closed issue; thus, it is not known if the Tribe has a mineral right below the surface of the bed as it existed in 1954.)

the United States." Thus, no treaty right to regulate may be argued to flow from the retained interests of the Tribe.

Nor may a tribal right to civil regulatory jurisdiction over non-Indians be argued to exist on the basis of the inherent sovereignty of the Tribe on the taken area. The relationship between the Tribe and non-Indians is one implicating the Tribe's external relations, and that authority has been divested. *See Brendale*, 492 U.S. at 425-426, (quoting *United States v. Wheeler*, 435 U.S. at 336) (White, J.).[26]

II

THE HOLDING OF *UNITED STATES V. DION* HAS NO APPLICATION TO THE ISSUE OF WHETHER A TRIBE MAY EXERCISE CIVIL REGULATORY JURISDICTION OVER NON-INDIANS. MOREOVER, EVEN IF *DION* DOES APPLY, THE TEXT AND LEGISLATIVE HISTORY OF THE 1954 CHEYENNE RIVER ACT INDICATE THAT THE TRIBE HAS BEEN DIVESTED OF WHATEVER CIVIL REGULATORY JURISDICTION IT MAY PREVIOUSLY HAVE HAD OVER NON-INDIANS IN THE TAKEN AREA.

A. The *Dion* Standard does not Apply to this Case.

Rather than apply the *Montana-Brendale* rule to the question of whether the tribe had civil regulatory jurisdiction over non-Indians on lands acquired from Indians, the Eighth Circuit Court of Appeals applied a rule it derived from *United States v. Dion*, 476 U.S. 734 (1986).

In determining whether the Eagle Protection Act applied to an Indian taking an eagle on tribal land, the *Dion* court

---

[26] Allowing a tribe to avoid *Montana-Brendale* on the basis that it retains a property interest but not "exclusive use and benefit" of the property would raise the threat of tribal civil regulatory jurisdiction over non-Indians on any local, state or federal road on a reservation in which the entire interest had not been obtained. Since states and counties regularly build roads across reservation lands, including trust lands, the potential disruption is very great indeed. *See* 25 U.S.C. §§ 323-327; 25 U.S.C. § 357; South Dakota Official Highway Map (1987).

demanded "clear evidence" of congressional consideration of the conflict between the treaty right in question and the intended action and resolution of the "conflict by abrogating the treaty." 476 U.S. at 739-740.

Neither *Montana* nor *Brendale*, however, applied such a stringent standard when determining whether the Tribe has civil regulatory jurisdiction over non-Indians. In *Montana*, there was no showing that Congress had "actually considered" the conflict between the alleged right under treaty to regulate non-Indian hunting and fishing and the allotment policy of the General Allotment Act. In *Brendale*, there was no showing that Congress "actually considered" the conflict between the alleged tribal right to zone land on the reservation and the allotment policy.

In *Montana* and *Brendale*, the focus was on the *effect* of congressional action on the authority of a tribe over non-Indians. In *Dion*, in contrast, the focus was on whether Congress had *actually considered* and accomplished the abrogation of a treaty right exercisable by a tribal member or tribe.

This Court has thus applied one standard in *Montana* and *Brendale* for determining when a tribe's *governmental authority* over nonmembers may be divested and another more stringent standard in *Dion* for determining when a tribe's *right to undertake a particular nongovernmental activity* may be divested. The *Montana-Brendale* approach speaks to the stark necessity of grounding tribal political regulatory authority over non-Indians on a firm historical and legal foundation. The *Dion* approach speaks to the traditional solicitude of the United States for the Indians when it provides special protections to nongovernmental activities of Indians.

Adoption of a *Dion* based rationale to questions of tribal civil regulatory jurisdiction over non-Indians would accordingly negate *Montana* and *Brendale*.[27]

---

[27] It is notable that *Dion* itself did not cite *Montana* although *Montana* had been decided five years earlier. None of the three opinions in *Brendale* cited or mentioned *Dion* although *Dion* had been decided three years at the time *Brendale* was handed down.

Dion and the logic of *Dion* do not apply to assertions by a tribe that it retains a specific governmental power over non-Indians, and the Court of Appeals erred in applying *Dion* to the issue in this case.

B. Even if *Dion* Applies Here, the Cheyenne River Act Abrogated any Tribal Right to Regulate Non-Indians in the Taken Area.

Even assuming the applicability of *Dion*, however, the Court of Appeals misapplied the rationale of the case in failing to find that the 1954 Cheyenne River Act abrogated whatever rights the tribe had to regulate non-Indians on the taken area.

In *Dion*, this Court considered whether the Eagle Protection Act abrogated the right of a tribal member to exercise his treaty guaranteed right to harvest eagles. The Court stated that it was essential that there be

> clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.

Dion, 476 U.S. at 740.

The Court focused on the text of the statute but also considered its legislative history and administrative interpretation in holding that the Eagle Protection Act abrogated the treaty rights of Indians at issue in *Dion*.

1. The text of the Cheyenne River Act clearly abrogates any tribal right to regulate non-Indians in the taken area.

The text of the Eagle Protection Act and of the 1954 Cheyenne River Taking Act are conceptually indistinguishable. The Eagle Protection Act at issue in *Dion*

> renders it a federal crime to "take, possess, sell, purchase, barter . . . any bald eagle . . . or any golden eagle."

476 U.S. at 740. The Act, however, authorizes

> the Secretary of the Interior to permit the taking, possession and transportation of eagles "for the religious purposes of Indian tribes," and for certain other narrow purposes, upon a determination that such taking, possession, or transportation is compatible with the preservation of the bald eagle or the golden eagle.

476 U.S. at 740. This Court found that the provision allowing the taking of eagles under secretarial permit for religious purposes of Indian tribes

> is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians. . . .

Dion, 476 U.S. at 740.

The Court reasoned that the provision requiring secretarial permission to hunt eagles for religious purposes precluded a claim that Congress had not understood that it was outlawing the taking of eagles by Indians *without* secretarial permission. In other words, the Court refused to find that the Indians retained any right other than that set out in statute.

The Cheyenne River Act has an analogous text and structure. The Cheyenne River Taking Act provides for the acquisition from the Tribe and its members of

> *all tribal, allotted, assigned, and inherited lands or interests* within said Cheyenne River Reservation belonging to the Indians of said reservation, which lands are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, now known as Oahe Dam, including such lands along the margin of such proposed reservoir *as may be required by the Chief of Engineers, United States Army, for the construction, protection, development, and use of said reservoir* all as described in Part II of this agreement, subject, however, to the conditions of this agreement. . . .

Pub. L. No. 776, § 1 (emphasis added) (J.A. 235).

The Cheyenne River Act also identifies certain specific rights which the Tribe retained and other rights which could be exercised by tribal members after the taking. Critically, the 1954 Cheyenne River Act states

> The said Tribal Council and the members of said Indian tribe shall have, without cost, the right of free *access* to the shoreline of the reservoir including the right *to hunt and fish* in and on the aforesaid shoreline and reservoir, *subject, however, to regulations* governing the corresponding *use* by other citizens of the United States.

Pub. L. No. 776, § 10 (emphasis added) (J.A. 244). Here the taking of rights is sweeping, as in the Eagle Protection Act. The remaining tribal right could be no greater than that specifically set out in the Act itself, pursuant to *Dion*, and Congress had set out the boundaries of that right, i.e., the tribe had only the right of "access" to hunt and fish but certainly not the right to "regulate" others.[28]

---

[28] Two cases which analyze language similar to Section X are *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916) and *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977). In *Becker*, the Court considered the effect of a grant of land by a tribe containing the following provision: "Also, excepting and reserving to them . . . the privilege of fishing and hunting on the . . . land hereby intended to be conveyed." *Becker*, 241 U.S. at 562. The right reserved was assumed to be an "easement" only to nonexclusive use of the area for hunting and fishing; such a right did not, in the view of the Court, insulate an Indian on the off-reservation land from state jurisdiction. *Becker*, 241 U.S. at 563-564. In other words, the words did not reserve governmental power. Similarly, in *Puyallup*, the Court noted a treaty provision which stated that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory." *Puyallup*, 433 U.S. at 176 n.16. According to the Court, this right reserved, as to treaty fishermen "a *previously* exclusive right." *Id.* (emphasis added). The Court stated that the language "recognizes that the right is to be shared 'in common with the non-Indian citizens of the territory.' " The property in question had been conveyed to non-Indians and the Court essentially readopted an earlier holding that the tribal right to fish was subject to "reasonable regulation by the state." 433 U.S. at 175.

2. The clear language of abrogation in the text of the Act is supported by the Act's legislative history.

As in *Dion*, "the legislative history of the statute supports" the view that the tribal right in question has been divested. 476 U.S. at 740. Two statutes are especially pertinent to this analysis.

a. 1950 statute.

Legislation was introduced in 1949 to allow negotiation of contracts with the Cheyenne River and Standing Rock Sioux Tribes in relation to construction of the Oahe Reservoir. The proposed act stated in part that any contract shall

> provide for the preservation of any treaty rights of the tribe in regard to fishing, hunting and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed. . . .

H.R. 5372, 81st Cong., 1st Sess., 4 (July 13, 1949) (PTA J, 4); *see also* S. 1488, 81st Cong., 1st Sess. (Apr. 12, 1949) (J.A. 182-184) (PTA K).

After hearing, Senator McFarland, the committee chairman, submitted S. Rep. No. 1737, 81st Cong., 2d Sess. (1950) (PTA N) which called for *deletion* of the house bill and proposed submission of a new bill. The new bill contained no provisions requiring protection of treaty rights, even "insofar as possible." The Senate agreed to strike the House bill and substitute the Senate Committee proposal. *See* 96 Cong. Rec. 14696-14697 (Sept. 13, 1950) (PTA P). Congress ultimately adopted the Senate bill – that is, the bill which did not provide for protection of treaty hunting and fishing rights, but

---

Thus, in neither circumstance involving language similar to Section X was the tribe held to have jurisdiction over non-Indians; in fact, in both the state was able to regulate the Indian hunters and fishers. While neither case is precisely on point, both point the way to a decision in this litigation.

instead provided for "just compensation" for all "interests" taken. Pub. L. No. 870, 64 Stat. 1093 (1950). (Pet. App. A-189). Representative Case explicitly drew attention of Congress to the treaty question:

> Hunting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by the Congress. To the extent that these may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land.

96 Cong. Rec. 15609 (Sept. 22, 1950). (J.A. 187) (PTA Q).

Thus, the Congress in the 1950 legislation recognized that hunting and fishing treaty rights would be "impaired or destroyed" by the legislation which would come afterwards, and determined to pay for that "impairment or destruction."

b. 1954 Cheyenne River Act.

The legislative history of the 1954 Cheyenne River Act also demonstrates that Congress intended to divest the Tribe of whatever civil regulatory jurisdiction it might have for hunting and fishing purposes over non-Indians, that the Tribe, through acceptance of Public Law 776, acquiesced to such divestment.

(1) Offer of payment for wildlife resources and grazing loss.

Congress offered payment for and the tribal members accepted payment for "all tribal, allotted, assigned and inherited lands or interests . . . as may be required . . . for the construction, protection, development and use" of the reservoir. *See* Pub. L. No. 776, 68 Stat. 1191 (1954). (J.A. 235). It also agreed to pay "for the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation." (J.A. 236). The Tribe, in addition, sought, the Congress offered and the Tribe accepted compensation for the permanent loss of wildlife in the area. This fact reinforces the view

that the Act and Section X in particular should not be read to allow tribal jurisdiction over non-Indians on that same area.[29]

Lloyd LeBeau of the Cheyenne River Sioux Tribe, testifying before the congressional committee, explained the tribal demand with relation to wildlife resources on the taken area:

> The value of this loss of wildlife resources was placed at $74,300 annually. *Because of the fact that we are losing these resources forever*, we have capitalized that sum at four percent to arrive at our value.

May 20, 1954, Hearings, *supra* at 265-266 (PTA RR, 265-266) (J.A. 207) (emphasis added).[30]

---

[29] Congress had been told by the Department of the Interior in 1950 that "over 400 deer" were estimated to live in the timbered area which would be inundated; it was further told that in the "bottoms area, pheasants, rabbits, and raccoons are numerous." H.R. Rep. No. 1047, 81st Cong., 1st Sess., 4 (1949). (J.A. 185). Other losses were also identified, but fishing was found "not important on either reservation at the present time." H.R. Rep. 1047, *supra* at 4; (J.A. 186). The Tribe stressed that the loss of the wildlife resource was complete. May 20, 1954 Hearings, *supra* at 266-268. (J.A. 208-210). Compensation was demanded based on the value of the wildlife to the Tribe. The Missouri River Basin Investigation Report estimated the annual amount of loss to be either at $36,600 or $74,300; the lower amount reflected the "increase in store bills which will result from the loss of game for food." Missouri River Basin Investigation Report No. 138 at 78 (Apr. 1954). (J.A. 193). The higher amount of $74,300 was based on the "sportsmen's expenditures [which] reflect the amount sportsmen are willing to spend to bag various species of game." Report No. 138, *supra* at 77-78 (PTA BB, 77-78). The Tribe based its demand on the higher amount. May 20, 1954 Hearings, *supra* at 265-266 (J.A. 207).

[30] Capitalization of the $74,300 figure at four percent yielded the ultimate claim of over $1,857,500 in permanent wildlife and wild product loss to the Tribe, May 20, 1954, Hearings, *supra* at 266 (PTA RR, 266) (J.A. 208), and this claim was submitted by the Tribe to Congress. *See* H.R. 2484, 83d Cong., 2d Sess., 5 (1954) (PTA T) (J.A. 215). After lengthy hearings, the tribal negotiating committee "scaled downward and resubmitted" its demand for loss of "wildlife, wild fruit, etc," to $1,056,750 (J.A. 216).

The Tribe also sought, was offered and ultimately accepted damages for the loss of grazing on the taken area in two categories. The individual Indian's right to graze land was subsumed in the value of the land itself, and therefore, the grazing damages to individuals were part of a $1,940,223.83 demand for "land, tribal, allotted, assigned, Indian fee patent, and irrigation potential." *See* H.R. Rep. No. 2484, 83d Cong., 2d Sess. (1954) (J.A. 216) (PTA T, 5).

More importantly, the Tribe demanded compensation in the category of tangible future damages, under the heading "[g]razing permit revenue loss."[31] *See* H.R. Rep. 2484, *supra* at 5 (PTA T, 5) (J.A. 215). Senator Watkins, in presenting the bill to the Senate, drew attention to the need for severance damages with regard to grazing lands. 100 Cong. Rec. 14979 (Aug. 18, 1954). (J.A. 231) (PTA F).

The amounts ultimately offered by Congress for the loss of wildlife resources, grazing loss and other indirect damages were combined with the direct damage offer, and the Act as passed offered $5,384,000.14.[32] (J.A. 236).

---

[31] This demand was based on the allegation of the unwillingness of livestock companies to pay the former grazing fees due to insufficient river frontage and lack of access to protection and winter feed presently afforded in river bottoms. Chairman Frank Ducheneaux of the Cheyenne River Sioux Tribe explained the matter in depth to the congressional committee. *See generally* May 19, 1954, Hearings, *supra* at 193-204, 209 (PTA U, 193-204, 209).

[32] The bill as introduced provided separately for the taking of the property and the severance damages. *See* H.R. 2233 at § 2 printed at 100 Cong. Rec. 13152 (Aug. 3, 1954). Category 1 (principally the land itself) and Category 2 damages (including the wildlife and grazing loss damages), were ultimately combined into a single category and reduced from a total of $6,587,854.95 to $5,384,000.14. *See Hearing before the Committee on Interior and Insular Affairs on H.R. 2233 (Aug. 17, 1954) pp. 3-4.* (J.A. 229-230) (PTA EE, pp. 3-4). The Act also provided an *additional* $5,160,000 for the "complete rehabilitation for all members of said Tribe. . . . " (J.A. 238-240).

(2) Acceptance by three-quarters of tribal members of the terms of Public Law 776.

As noted, the provisions of Public Law 776 were not effective until accepted by three-quarters of the adult population of the Tribe. (J.A. 235-236). Members of the Tribe voted overwhelmingly to accept the offer contained in the provisions of Public Law 776. The ballot submitted to tribal members states in part:

> The major provisions of Public Law 776 as follows . . .
>
> 1. The United States will pay to the Indian owners $2,250,000 for the Indian lands taken for the Oahe project. . . .
>
> 2. The United States will pay $3,134,014 for indirect damages caused by taking the Indian lands for the Oahe project. . . .
>
> 3. The United States will provide $5,160,000 for rehabilitating members of the tribe who were residents of the reservation on September 3, 1954. . . .
>
> . . . .
>
> 6. *Indians may graze livestock on the part of the land not flooded and may hunt and fish in the taking area without charge.*

(J.A. 262-264) (PTA HH, 1) (emphasis added).

Ninety-two percent of those tribal members who voted cast a ballot in favor of the acceptance of Public Law 776. (J.A. 266) (PRB B). Of the total membership of the Tribe eligible to vote, 75.35 percent voted in favor. *Id.* The acceptance of the terms of Public Law 776 by the Tribe signals a recognition by the Tribe and its members that all of their legitimate demands were accounted for, including their demands with relation to wildlife and grazing. Furthermore, the acceptance of Section X of Public Law 776 and the explanation of that section in the ballot, preclude the Tribe's present claim that the Tribe has more rights than those identified in Section X and the ballot.

3. The administrative interpretation of the Taking Acts supports State jurisdiction over non-Indians on the lands at issue.

The consistent administrative interpretation of "taken area" legislation by the agency with the primary responsibility, the Army Corps of Engineers, has been that the State has jurisdiction over non-Indians on the Missouri River "taken areas," including the lands and waters. For example, on September 15, 1986, Colonel West of the Corps of Engineers wrote to the South Dakota Game, Fish and Parks Secretary that:

> The position of the Omaha District, as well as the State of South Dakota, has always been that regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law. This was clearly the intent of Section 4 of the 1944 Flood Control Act, 16 U.S.C. § 460(d). As you know, the Corps has only proprietorial jurisdiction over its project lands along the mainstem of the Missouri River in South Dakota. Such lands remain subject to state civil and criminal jurisdiction.

(PTA LL, 1) (J.A. 288).[33]

---

[33] Other correspondence is also pertinent: A letter of March 9, 1976, from Colonel Glenn of the Corps of Engineers to Michael Jandreau, chairman of the Lower Brule Sioux Tribe, stated the opinion of the Corps with regard to the take areas adjoining the Lower Brule Reservation. According to Colonel Glenn, "the Fish and Game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members." Letter of Mar. 9, 1976 (PTA JJ, 5, J.A. 268). A similar letter was sent at the same time to the chairperson of the Crow Creek Sioux Tribe. (PTA KK).

Similarly, in 1988, the Office of Counsel of the Department of Army took notice of the "relatively recent" jurisdictional dispute and stated in a letter to the Crow Creek Sioux Tribe:

> While I take no position as to whether the Tribe or State ultimately should have jurisdiction in this matter, until the question is finally resolved, I must be guided by the existing

On November 19, 1987, the subject came before the Senate Select Committee on Indian Affairs. The Corps of Engineers informed the Select Committee that the State, not the Tribe, had jurisdiction on the Corps taken area for hunting and fishing purposes. According to the Chief of the Planning Division of the Missouri River Division, Mr. John Velehradsky:

> Senator, it is my understanding that, in this instance, we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies. . . . We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

S. Hrg. No. 100-500, 100th Cong., 1st Sess. (Nov. 19, 1987) p. 12 (J.A. 297) (PTA MM, 12). This discussion concerned two other reservations which are adjacent to the Missouri River main stem, but the statement clearly has application to the Cheyenne River taken area, in the State's view.

Finally, it is significant that the pronouncements of the Corps to the public also recognize state jurisdiction and not tribal jurisdiction on the taken area. In United States Army Corps of Engineers, Omaha District, Lake Oahe, *Oahe Dam Boating and Recreation Manual* (March 1984) (sheet 1 of 30), an atlas distributed to the public by the Corps of Engineers, it is said

> *Hunting and fishing is allowed on Lake Oahe and project land*, unless posted otherwise, *in accordance with the rules and regulations established by* the North Dakota Game and Fish Department, *the South Dakota Game, Fish and Parks Department*

---

legal record and court decisions. These indicate to me that it was the intent of Congress that jurisdiction over these former Indian lands is in the State of South Dakota.

(J.A. 301, PTA NN, 2).

> *and the U.S. Fish and Wildlife Service*. These regulations may change annually so hunters and fishermen are advised to review current regulations before engaging in these forms of recreation.

(PH Ex. 33) (J.A. 284) (emphasis added).

In sum, the text, legislative history and administrative interpretation of the Cheyenne River Act of 1954 indicate an "unmistakable" policy choice by Congress to divest the Tribe of whatever civil regulatory jurisdiction it might have had over non-Indians hunting and fishing on the taken area. This meets the *Dion* test.

III

THE BRIGHT-LINE RULE OF *MONTANA-BRENDALE* APPLIES TO NON-INDIANS HUNTING AND FISHING ON TAKEN AREA PROPERTY ACQUIRED IN FEE FROM NON-INDIANS.

Approximately 18,000 acres were acquired for construction and operation of the Oahe Reservoir from non-Indians within the reservation under the general authority of the 1944 Flood Control Act. H.R. Rep. No. 1047, *supra* at 3. (J.A. 185) (PTA O, 4).

The District Court did not distinguish between lands acquired from non-Indians and lands acquired from the Tribe and its members. The District Court held, in consequence, that the Tribe lacked civil regulatory jurisdiction over non-Indians on all of the taken area. The decision of the District Court was correct. In *Montana* and *Brendale*, as set forth above, this Court has established the principle that a tribe lacks even an "arguable" claim to jurisdiction over non-Indians by virtue of the treaty power unless it holds "absolute and undisturbed use" of the lands in question. In the case of lands acquired from non-Indians, such lands were not, *before* the acquisition by the United States, held in "absolute and undisturbed use" by the tribe nor were they *afterwards* held by the tribe in such status.

Montana and *Brendale* also establish that the Tribe has been divested of its inherent sovereignty over its external relations or, in other words, over the relationship between the Tribe with nonmembers or non-Indians. Certainly that principle applies fully and forcefully with regard to a non-Indian on lands which were non-Indian before the Oahe acquisition, which remained non-Indian after that acquisition, and which were open to the public under Section X of the act in question. Thus, the decision of the District Court is correct.

The Court of Appeals, however, failed to apply the bright-line rule of *Montana-Brendale* here. As noted, the Court of Appeals distinguished between lands acquired from Indians and lands acquired from non-Indians – a distinction without basis in this Court's rulings or in the facts of this case.

As to lands acquired from non-Indians, the Court of Appeals remanded to the District Court to apply a *Montana* analysis in light of its reversal. The appellate court observed in a footnote, however, that if the land had originally been acquired by non-Indians other than through "an allotment act," the analysis "may be" that *Montana* did not apply to the case. *Bourland*, 949 F.2d at 995 n.19 (Pet. App. A-45 n.19).

The approach of the Court of Appeals is wrong and unworkable. Apparently, in the view of the Eighth Circuit, the Tribe is divested of civil regulatory jurisdiction over non-Indians on lands acquired from non-Indians only if this statute under which the original acquisition occurred is an allotment act or other act accompanied by the "intent to destroy tribal government." *Bourland*, 949 F.2d at 991 (Pet. App. A-27). For this reason, the District Court on remand is essentially instructed to determine, with regard to *each parcel*, how the parcel was acquired and whether, if no allotment act was involved, the statute at issue was the equivalent of an allotment act.

In remanding for the District Court to reapply *Montana*, the Eighth Circuit seemed confused as to this Court's opinions in *Brendale*. The Court of Appeals reasoned that:

> Because the 18,000 acres within the taken area are in an "open area", the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage. According to Justice White's opinion, the 18,000 acres should be analyzed under the *Montana* standard. *Brendale*, 492 U.S. at 421-433, 109 S.Ct. at 3003-3009. The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied.

Bourland, 949 F.2d at 995 (Pet. App. A-45-A-46). The Court of Appeals thereby misapplied both *Montana* and *Brendale*. Justice White's plurality opinion in *Brendale* does not rely on the "open-closed" distinction utilized in Justice Stevens' concurring opinion. *See* 492 U.S. at 423-425 and n.8. Second, the *Brendale* plurality finds that if the second of the two *Montana* exceptions applies, i.e., relating to the impact of nonmember activity on the political integrity, economic security or health and welfare of the Tribe, this factor would give rise to federal or state, not tribal court, jurisdiction. 492 U.S. at 431.

The Eighth Circuit's misreading argues, we respectfully suggest, for adoption of the bright-line rule of the *Montana* case and the *Brendale* plurality as set forth above. Because the Tribe does not maintain "exclusive use and benefit" of lands acquired by the United States from non-Indians on the taken area (regardless of how those lands were originally by the non-Indians acquired), it has no claim derived from a treaty power to regulate non-Indians on such lands. Further, because the dispute in question is one involving the external relations of the Tribe and the Tribe has been divested of its inherent sovereignty over its external relations, it follows that the Tribe has no civil regulatory power over non-Indians on the taken area.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court reverse the decision of the Circuit Court which reversed the order of the District Court permanently enjoining the Defendants from enforcing tribal hunting and fishing regulations on the portion of the taken area acquired pursuant to the Cheyenne River Act, *see Bourland*, 949 F.2d at 996 (Pet. App. 51); the State further respectfully requests that this Court reverse the decision of the Circuit Court remanding the case for proceedings consistent with its opinion with regard to the portion of the taken area comprising land other than that conveyed to the United States pursuant to the Cheyenne River Act, *see id.*; the State finally respectfully requests that this Court hold that the Tribe has no civil regulatory jurisdiction over non-Indians on the entire taken area at issue and remand for reinstatement of the order of the District Court permanently enjoining the tribal Defendants from regulating the hunting and fishing activities of non-Indians in the entire taken area.

Respectfully submitted,

MARK BARNETT*
Attorney General
State of South Dakota
500 E. Capitol
Pierre, South Dakota 57501-5070
(605) 773-3215

JOHN P. GUHIN
Deputy Attorney General
500 E. Capitol
Pierre, South Dakota 57501-5070
(605) 773-3215

*Counsel of Record